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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 816

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

BRIEF AMICUS CURIAE IN SUPPORT OF PETTITION FOR REHEARING FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 10TH CIRCUIT

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 10TH CIRCUIT

I. REASONS FOR THE PETITION

1. 5th and 7th Amendments

Petitioner contends that it has been denied 5th and 7th Amendment rights in that its property has been taken without due process and without jury trial.

2. 14th Amendment

National Rural Letter Carriers' Association, as *amicus curiae* in support of the Petition, contends that thousands of rural letter carriers would be deprived of the equal protection of state laws in relation to federal law.

3. Extensive Litigation

Numerous cases have been litigated in the United States District Courts involving the issues herein. One is now on appeal to the United States Court of Appeals for the 5th Circuit.[1] Many more cases will arise if the decision below is sustained because one question presented herein — the requirements of applicable state statutes – would have to be litigated in each state, territory and the District of Columbia.

4. Conflict of Appellate Decisions

The decision herein conflicts with that of this Court in *United States v. Gilman*, 347 U.S. 507 (1953).

5. Intent of Congress

Congressional intent is misconstrued by the decision below.

6. Public Interest

In addition to the broad interests of the insurance industry, set forth in the Petition, 37,500 individuals belonging to one association and an uncounted number of unaffiliated persons and persons belonging to other associations are directly and adversely affected by the decision below.

This Brief sets forth the interest of the *amicus curiae*, the purpose of the Government Drivers Law, the impossibility of the Solicitor General's solution, the hardship to citizens and an equal protection of the laws problem. This Brief merely notes that the decision below is contrary to that in *Gilman, supra*, the matter having been fully argued in the Petition.

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[1] *United States v. Myers et al*, #22830.

II. INTEREST OF THE AMICUS CURIAE

1. National Rural Letter Carriers' Association

The National Rural Letter Carriers' Association is *amicus curiae* herein in support of Appellant's Petition for issuance of a Writ of Certiorari.

The National Rural Letter Carriers' Association (hereinafter, "NRLCA") has 43,000 members, of whom 29,500 are regular Post Office Department (hereinafter, "POD") rural letter carriers, 5,500 are retired POD rural carriers and 8,000 are substitute POD rural letter carriers. Of its membership of 43,000 individuals, a total of 37,500 individuals serve as POD rural letter carriers. Some 92% of all regular POD rural letter carriers belong to NRLCA. NRLCA properly and authoritatively represents the interests and views of its members.

2. The Individual POD Rural Letter Carrier

The Government Drivers Law, 28 USC § 3679, directly affects the livelihood of NRLCA members, on whose behalf NRLCA files this Brief *amicus*.

POD rural letter carriers deliver mail to assigned rural mail boxes. They use privately owned motor vehicles for this purpose. Although they are POD employees performing an assigned job on behalf of the Government, the Government does not furnish them motor vehicles. Most rural letter carriers own two or more motor vehicles, only one of which at any given time is used for delivery of the mail but any or all of which may be used from time to time for such delivery. POD furnishes no liability or other motor vehicle insurance for such vehicles when they are used in the scope of POD employment or otherwise.

The individual rural letter carrier must bear the full expense of providing and operating a motor vehicle.[2] He is required to have a vehicle available at all times. Consequently, he must have ready access to a substitute vehicle for use should his primary vehicle become inoperative. The state of the art of motor vehicle construction and maintenance, one may note, is such that any motor vehicle undergoing heavy and continual use, often over poor roads and in all types of weather, from time to time will be inoperative.

Some rural letter carriers engage in business other than that of rural letter carrier. Sometimes use of one's motor vehicle is required in pursuit of such additional business. A large number of rural letter carriers live on farms[3] and at the least use one or more of their motor vehicles in operating such farms. Even when a letter carrier is engaged in an occupation in addition to mail delivery (other than farming),[4] only one of his vehicles is rated Class III[5] and such rating covers occupational

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[2] The letter carrier's expense for each car used in, or alternatively, available for, mail delivery includes purchase or rental (usually the former), replacement and/or repair, licensing, insurance and maintenance. The rural letter carrier receives an allowance based upon route length, days of operation and route conditions. This allowance includes neither a direct figure for liability insurance nor one for a substitute vehicle.

[3] The overwhelming majority of all rural letter carriers are rated Class IAF by liability insurance companies, meaning that the insured carrier lives on what the insurance industry considers a farm and not necessarily meaning that the insured carrier is regarded as a farmer. The distinction is not relevant herein.

[4] NRLCA believes that relatively few carriers engage their motor vehicles in occupations other than mail delivery and farming, the large number being solely POD rural letter carriers.

[5] Applicable insurance ratings are Class IA - motor vehicle normally is not used in scope of his employment; Class IAF - same but situs of insured's residence is a farm; Class III -

[*Continued, next page*]

use of the vehicle for such occupation other than mail delivery or farming.

3. The Government Drivers Law

The role of the individual rural letter carrier as a possible defendant in a civil tort action and as an insured who must pay liability insurance premiums is of vital importance to NRLCA, to the rural letter carrier and to POD.

Prior to enactment of the Government Drivers Law, an aggrieved individual could sue the United States pursuant to the Federal Tort Claims Act, 28 USC § 1346(b), on account of the letter carrier's alleged negligence in the scope of his employment in delivering the mail. Alternatively or additionally, the aggrieved individual could sue the letter carrier in the appropriate state court.

Since enactment of the Government Drivers Law, an aggrieved individual may sue only the United States and if such individual sues a person coming within the scope of the Law, upon motion of the Attorney General, such action is removed to the appropriate United States District Court and the United States is substituted as a party defendant. As Petitioner has noted fully, the Attorney General then assumes control of the litigation and there is no provision in a statute or in the Federal Rules of Civil Procedure authorizing the Attorney General to relinquish defense of the action to attorneys for the insured's liability insurance company.[6]

[*Fn.* 5, *cont'd*]
motor vehicle is used in scope of employment and insurance company may be liable if insured is negligent in the scope of his employment.

[6] As set out *in extenso* in the Petition, the liability insurance company not only loses control of the litigation but also loses the right to trial by jury and runs the risk that the Attorney General, having decided the accident occurred in the scope of the insured's POD employment, is free thereafter to reverse

[*Cont'd, next page*]

4. The Individual Letter Carrier as Defendant

Thus, the letter carrier is nominally relieved of the burden of the role of defendant in a tort action. As is explained *infra*,[7] such relief is wholly illusory if the rationale of the Court of Appeals for the 10th Circuit and of the Solicitor General herein is to prevail.

5. The Individual Letter Carrier as Insured

If the individual letter carrier must insure only himself and those using his motor vehicles, he saves substantially on his insurance premium. If he must insure every party which may be held liable vicariously for his negligence and also the United States, he not only saves no premium, but as is set forth *infra*,[8] must pay a staggeringly larger premium than he would have paid prior to March 21, 1962, the date the Government Drivers Law became effective.

The merits of NRLCA's arguments aside, it is obvious that if the letter carrier saves no premium as a consequence of the Government Drivers Law or, worse yet, must pay an increased premium or become uninsurable, the letter carrier has gained nothing from the Government Drivers Law, for clearly his duties and his nuisance burden as a witness, as a likely deponent and as one otherwise integrally and principally involved in litigation do not diminish. Indeed, the letter carrier gains nothing except

[*Fn.* 6, *cont'd*]
his decision, remanding the defense to attorneys for the insurance company at a point in time when they may have lost evidentiary and/or negotiation opportunities. NRLCA concurs in the 5th and 7th Amendment objections raised to this procedure and argued in the Petition. However, neither NRLCA's interest nor its argument herein is predicated upon these grounds, both of which, while considered viable, relate to the constitutional rights of the insurance company only.

[7] Part IV, § 4; Part V.

[8] Part V, § 2.

in the rare case in which the final judgment might otherwise have been in excess of maximum liability coverage.

The significance of the foregoing is set forth *infra*.[9]

III. THE PURPOSE OF THE GOVERNMENT DRIVERS LAW

1. Intent of NRLCA

The intent of NRLCA, as one of several organizations and federal agencies sponsoring the Government Drivers Law, was a goal of complete protection for the letter carrier — real and not illusory immunity from suit.

Specifically, NRLCA intended that the Government Drivers Law should provide maximum practical benefit to the government driver. As a trade association attempting conscientiously to fulfill the needs of its members, NRLCA would not have advocated a change in the law which would have rendered NRLCA members uninsurable or which would have resulted in a staggering increase in liability insurance premiums. In its testimony[10], NRLCA stated, in pertinent part, that: "such liabilities resulting from the operation of a motor vehicle by an employee are, in our opinion, a just and proper responsibility of the employer — the United States Government."

That NRLCA would have intended Congress to enact a statute which would render NRLCA members uninsurable or which would substantially increase their liability insurance premiums is untenable as contrary to legislative history and contrary to logic.

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[9] Part V.

[10] Statement of Mr. Charles R. Larson, President, NRLCA, before House Judiciary Subcommittee #2, on HR 3283, 87th Congress, a companion bill.

2. Intent of Sponsoring Federal Agencies

The Department of Justice, the Department of Defense, the Post Office Department, the General Services Administration and the National Aeronautics and Space Administration joined in sponsoring the Government Drivers Law. These agencies supported HR 7577, 86th Congress, 2d Session, which was vetoed by the President for reasons not here relevant.[11] They then supported HR 2883, 87th Congress, 1st Session, which was enacted without the debilitating Senate amendment.

Congress considered providing for purchase at the Government's expense of commercial liability insurance but took the view, as expressed by GSA in its Speaker Letter, that ". . . procurement by the Government of liability insurance would entail substantial and needless expense. . . ."[12]

Thus, Congress was specifically introduced to the mode of commercial liability insurance. It rejected that mode.

Congress was also specifically introduced to another approach involving commerical liability insurance, namely, the funding of such insurance by the letter carrier. GSA pointed out appropriately:

> "The enactment of this amendment for the protection of the Government driver would afford the relief desired by him, for there would be *then no point in his spending his own funds to take out liability insurance*

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[11] HR 7577, as amended by the Senate, required the consent of the plaintiff before the action could be removed to the United States District Court. President Eisenhower vetoed the Act, because, *inter alia*, the Senate Amendment would ". . . prevent the conversion of the action to one under the Federal Tort Claims Act and thus thwart the sound purpose of the original Bill." US Code Cong & Ad News, p. 2797.

[12] 1961 US Code Cong & Ad News, p. 1449 *et seq*, letter from GSA Administrator Franklin Floete to Speaker Sam Rayburn. Set forth in full in Senate Report #736, 87th Congress, 1st Session, p. 6 *et seq*.

to protect him while operating motor vehicles in the scope of his employment for the Government." (Italics supplied)[13]

After considering imposition upon the driver of the cost of commercial liability insurance, Congress concluded that it desired ". . . to protect the Government driver from the ever-present danger of personal liability and [*to*] *relieve him of the expense of supplying private liability insurance.*"[14] Congress obviously intended the liability of the United States to be predicated upon a statute and not upon a driver's personal liability insurance. The rationale of Congress is not dissimilar from that which this Court recognized with regard to the Federal Tort Claims Act in slightly different context.[15]

The legislative history shows Congress had only one precedent cited to it, namely, the exclusive remedy doctrine of the Suits in Admiralty Act, 46 USC § 745. NRLCA knows of no case in which the United States has sought indemnity over against an insurance company pursuant to the Suits in Admiralty Act.

3. Intent of Congress

There is nothing in the legislative history to indicate that Congress even considered allowing the United States indemnity over against the insured's commerical liability

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[13] *Ibid.*

[14] *Ibid.* Statement of purpose favorably quoted in *Uptagrafft v. United States*, 315 F.2d 200, 204 (USCA, 4th Cir, 1963).

[15] *United States v. Gilman*, 347 U.S. 507, 510 (1953). ". . . we deal only with a rule of indemnity which is utterly independent of any underwriting of liability." *Per* Mr. Justice Douglas. In *Gilman*, this Court denied the United States indemnity over against the individual tortfeasor employee, holding the Federal Tort Claims Act did not allow it. Indemnity over against the employee's insurance company is no different. The ultimate burden either way would fall upon the letter carrier.

insurance company. It is obvious that, considering Congress' concern that the individual driver would not have to pay insurance rates to cover his scope of employment insurance, Congress cannot be assumed to have legislated an indemnity right on the one hand (for which only the individual driver could pay) while legislating an exclusive premium-free remedy against the United States on the other hand.

This Court must assume Congress spoke in 1961 to the state of the law as it then existed. The state of the law at that time included the holding of this Court in *Gilman*. If one reads *Gilman* as holding that this Court cannot fashion a rule whereby the United States is indemnified if the driver carries liability insurance but is not indemnified if the driver does not carry it — and there is no other way to read *Gilman* — then this Court would not want to assume that Congress by inarticulate phraseology or mysteriously meaningful silence created a right of indemnity over by the terms of the Government Drivers Law which is otherwise unknown to the Federal Tort Claims Act.

The Federal Tort Claims Act speaks only to actions in tort. Counterclaim and related jurisdiction pursuant to the Federal Tort Claims Act as set forth in 28 USC § 2679 is at most no extension of the counterclaim and related jurisdiction of the United States pursuant to 28 USC § 1346 (c). Application of the latter is limited to ". . . jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this Section." If Congress wanted to give the United States the right of indemnity over pursuant to the Government Drivers Law, Congress would not have limited the Federal Tort Claims Act to torts and limited 28 USC § 2679 thereof to the requirements of 28 USC § 1346(b). In view of the broader and pre-existing language of Rule 14(a), Federal Rules of Civil Procedure, if Congress wanted to afford the United States the broad indemnity rights the Solicitor General

now claims, it could have done so by appropriate phraseology or perhaps just by silence.

This Court would want to interpret the intent of Congress, considering there is no contrary manifestation, to be consistent with the intent of the sponsors of the Government Drivers Law. That intent is clear — complete protection for the individual driver.

This Court does not attempt to read a legislative enactment as one might query the Delphic Oracle. If the view of the Court of Appeals for the 10th Circuit were properly to be sustained, somewhere in statutory language or in legislative history the right of indemnity would be prescribed or implied. It is neither.

IV. THE SOLICITOR GENERAL'S IMPOSSIBLE SOLUTION

1. Revision of the Omnibus Clause

The Solicitor General suggests that "Petitioner and other insurers may, if they choose, avoid such liability [for indemnity . . . by . . . amending the [omnibus] clause." [16] Thereby the Solicitor General is able to claim that the decision below ". . . involves only the interpretation of the particular insurance contract at issue." [17]

The fact is every government driver's liability insurance policy is affected by the decision below and there is no means whereby these policies can be rewritten to prevent exercise of the right of indemnity over which the Court of Appeals herein says exists.

2. Requirements of the States

Every State and the District of Columbia have some kind of compulsory automobile insurance law [18] or finan-

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[16] Memorandum for the United States in Opposition, p. 2.

[17] *Ibid.*

[18] Maryland, Massachusetts, New York, North Carolina, Virginia.

cial responsibility law. These laws leave little or no leeway as to what an insurance company may say in an insurance policy. The Solicitor General's terse characterization of these laws as not "excluding the United States from coverage wherever Congress has provided that the United States shall be responsible for such damage" is without support. State laws do not permit deviations from required terminology. Even when state regulatory bodies have authorized deviations, such authorization has been struck down by the Courts.

In *Landis v. New Amsterdam Casualty Company*, 347 Ill. App. 560, 107 N.E. 2d 187, 190-191 (1952), involving a garage liability policy without a required omnibus clause, the Appellate Court of Illinois, 4th District, pertinently stated:

> "The fact that the [Illinois Motor Vehicle Financial Responsibility] Statute requires the inclusion of an omnibus clause in a liability insurance policy makes such inclusion mandatory and the provision will be read into the policy . . ."

The Supreme Court of New Jersey ruled similarly in *Saffore v. Atlantic Casualty Insurance Company*, 121 A.2d 543 (1956), involving a policy which included a named insured only. [19]

In *Merchants Mutual Casualty Company v. Capobianco et al*, 123 A.2d 159 (1956), the Supreme Court of New Hampshire held that the required minimum statutory limits must be read into the policy.

In *Standard Accident Insurance Company v. New Amsterdam Casualty Company*, 249 F.2d 847 (USCA, 7th Cir, 1957); in *(American) Lumbermen's Mutual Casualty Company of Illinois v. Timms and Howard, Inc.*, 108 F.2d 497 (USCA, 2d Cir, 1940); and in *Newton v. Employers Liabil-*

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[19] ". . . The insurer could refuse to enter into the contract of insurance required by the statute; but, having undertaken to give liability insurance coverage, the statutory terms [sic] become a constituent element of the contract . . ." *Op cit*, p. 548.

ity Assurance Corporation, 107 F.2d 164 (USCA, 4th Cir, 1939), cert. den., 309 U.S. 673; Illinois, New York and Virginia statutes requiring omnibus clauses were enforced notwithstanding contrary or inconsistent language of the insurance policies. In *Newton*, the Virginia Bureau of Insurance had specifically authorized language deviating from the omnibus clause.

Courts have consistently held that insurance policies are affected with a public interest and that, therefore, mandatory statutory provisions are to be enforced.[20]

It would be superfluous to set forth *verbatim et literatim* the provisions of said laws which require an omnibus clause without the kind of exclusion the Solicitor General suggests or which require financial responsibility proof incompatible with that suggestion. A few citations might be helpful.[21]

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[20] *Travelers Insurance Company v. Caldwell*, 133 F.2d 649 (USCA, 8th Cir, 1943), cert. den., 320 U.S. 736 — absence of required endorsement in application for common carrier certificate (Arkansas); *American Alliance Insurance Company v. Brady Transfer & Storage Company*, 101 F.2d 144 (USCA, 8th Cir, 1939) — requirement of motor carriers liability (Iowa); *Marriott et al v. National Mutual Casualty Company et al*, 195 F.2d 462 (USCA, 8th Cir, 1952) — liability insurance for carriers (Kansas); *Inland Mutual Insurance Company v. Stallings et al*, 263 F.2d 852 (USCA, 4th Cir, 1959) — proof of financial responsibility pursuant to Financial Responsibility Law (Maryland); *Kelly v. Capital Insurance & Surety Company*, 241 F. Supp. 605 (USDC, Guam, 1965) — Guam Financial Responsibility Law.

[21] Alabama (all references are to State Codes) - § 74(62)(a), (b)2. Alaska - § 46(1), (2)(b). Arizona - § 28-1170A, B2; see *Jenkins v. Mayflower Insurance Exchange*, 93 Ariz. 287, 380 P.2d 145 (1963). Arkansas - § 75-1466a, b2. California - § 11580.1; see *Wildman v. Government Employees Insurance Company*, 448 Cal. 2d 31, 307 P.2d 359 (1957); § 11580.1(d), §§ 16450-16452. Colorado - § 13-7-22(1)(a), (c). Delaware - §2904(a), (b)(2). District of Columbia - § 40-473(a), (b)2. Hawaii - § 160-103(b). Idaho - § 49-1521(a), (b)2. Illinois - § 7-317(a), (b)2. Iowa - § 321A.21.1, 2.b. Kansas - § 8-750(a)(2).

[*Cont'd, next page*]

3. Requirements of the Department of Defense

The Department of Defense also has a regulation (1) requiring adherence to minima in applicable state laws and (2) forbidding ". . . unusual limitations or restrictions including . . . coverage limited to exclude liability . . . if such liability exists as a matter of law."[22]

The validity of this regulation has been sustained. *Royal Standard Insurance Company v. McNamara*, 344 F.2d 240 (USCA, 8th Cir, 1965).[23]

4. Absence of a Solution

As the foregoing illustrates, the suggestion of the Solicitor General is unworkable. State laws and the DOD regulation do not permit exclusions in omnibus clauses

[*Fn.* 21, *cont'd*]

Kentucky - § 187.490(1), (2) (b). Louisiana - § 900A, B(2). Maryland - § 131-131(a) (3). Michigan - § 257.520(a), (b)2. Minnesota - § 170.40, Subdivision 1, 2(2). Mississippi - § 8285-21(a), (b)2. Missouri - § 303.190.1, 2(2). Montana - § 53-438(a), (b) 2. Nebraska - § 60.534 (2). Nevada - § 485.3091-1, 2(b). New Jersey - § 39:6-46, (a). New Mexico - § 64-24-87(a), (b)(2). New York - § 345(a), (b) (2). North Carolina - § 820-279.21(a), (b)2. North Dakota - § 39-16-20.1, 2b. Ohio - § 4509-51(B). Oklahoma - § 7-324(a), (b)2. Pennsylvania - § 1421(a), (b) (2). Rhode Island - § 31-32-24(a), (b) (2). South Carolina - § 46-702(7). South Dakota - § 44.03A51 (1), (2) (b). Tennessee - § 59-1223a, b(2). Texas - § 21(a), (b)2. Virginia - § 38.1 - 381(a); see *Maryland Casualty Company v. Burley et al*, 345 F.2d 138 (1965), § 46.1-504(b), (c), § 46.29.290(1), (2) (b). West Virginia - § 12(a), (b) (2). Wisconsin - § 204.30(1), (3), § 344.33(1), (2) (c). Wyoming - § 31-306(a), (b)2.

[22] DOD Directive #1344.6 (April 15, 1964), § B.3.d of unnumbered section "INSURERS, AGENTS AND INSURANCE POLICIES."

[23] ". . . a motor vehicle liability insurance policy meets the requirements if it . . . (4) *does not contain* unusual limitations including, but not limited to . . . (b) *coverage limitations which exclude liability for bodily injury to passengers and guests if such liability exists as a matter of law.*" *Royal Standard*, *op cit*, p. 241. (Italics partially supplied.)

and/or in insurance policies conditioned to meet the requirements of financial responsibility laws.

Perhaps it was with the foregoing in mind as it related specifically to Massachusetts that the Boston Regional Office, POD, on May 13, 1965 advised all appropriate POD officials in the Boston Region,[24] *inter alia*, that "*if we all use our P.O.A. (privately owned automobile) with any regularity on postal business, we must have business coverage if we expect to be protected by our policy.*"[25]

Thus, it is seen that as a matter of law the insurance companies cannot protect the letter carriers by doing as the Solicitor General suggests.

5. Inconsistency Within the Government

Apart from the legal impossibility of the Solicitor General's suggested solution, the Government itself in practice does not recognize such solution.

On June 28, 1965, the United States Attorney for the District of Minnesota filed the Complaint in CA #2-65-184, *United States v. National Insurance Underwriters*. In that Complaint, the United States seeks indemnity over against Defendant as a consequence of an award which the United States administratively paid to the damaged party. The Complaint ignores the fact that the insurance policy carries the very exclusion which the Solicitor General

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[24] Which includes all New England.

[25] Memorandum, Special Assistant for Employee Relations, Boston Regional Office, POD, May 13, 1965, to State Representative, Division Directors, Regional Representatives - Employee Organizations, subject: "Insurance When Using Private Cars on Postal Business in Massachusetts."

suggests.[26] Defendant's Answer, of course, raises this defense.[27]

To NRLCA and to insurance companies with which its members deal, it is obvious that the Government as a party litigant intends to enforce its alleged right of indemnity over regardless of endorsements which might stand the test of state statutory requirements and regardless of the Solicitor General's suggestion. NRLCA seeks to protect its members against the realities of the Government as a party litigant.

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[26] The exclusionary endorsement therein reads as follows: "This policy does not apply under liability coverage to the United States of America or any of its agencies." The more customary exclusionary endorsement reads as follows: "It is agreed that the policy does not apply under the liability coverages to the following as insureds: (1) The United States of America or any of its agencies; (2) Any person including the named insured, with respect to bodily injury or property damage resulting from the operation of an automobile by such person as an employee of the United States Government while acting within the scope of his office or employment, if the provisions of § 2679 of Title 28, United States Code (Federal Tort Claims Act), as amended require the Attorney General of the United States to defend such person in any civil action or proceeding which may be brought for such bodily injury or property damage, whether or not the incident out of which such bodily injury or property damage arose has been reported by or on behalf of such person to the United States or the Attorney General."

[27] Plaintiff apparently intends to raise a preliminary issue that the endorsement is inapplicable, not because it violates Minnesota law, but because the insurance company did not reduce the premium to the insured carrier when it endorsed the policy. If Plaintiff pursues this argument, the inconsistency between its position therein and the Solicitor General's suggestion is equally evident although in a differing vein, for Mr. Nock was rated Class IAF and there is no lower rating, with or without a restrictive endorsement. As is shown *infra*, Part V, the question is not whether a restrictive endorsement lowers a IAF premium but whether liability for indemnity raises a IAF premium.

V. HARDSHIP TO NRLCA MEMBERS

1. Rate Differential - Business and Non-Business Use

If one assumes there is legal merit to the Solicitor General's suggestion, one still finds no practical merit to it because the individual letter carrier is hurt by necessary rate differentials.

The case at bar arose in New Mexico. For this reason some New Mexico statistics are cited.

In each of New Mexico's two territories, the Class III rate is 151% of the Class IA rate. In one territory, the Class III rate is 212.5% of the Class IAF rate. In the other territory, it is 208.3%. These figures are reported by the National Bureau of Casualty Underwriters, largest automobile rating bureau in the United States.

California and Texas are states with large areas, large rural populations and large numbers of rural letter carriers.

Of 50 territories in California, two are picked at random. In one, the Class III rate is 151% of the Class IA rate, 214% of the Class IAF rate. In the other, the Class III rate is 150% of the Class IA rate, 215% of the Class IAF rate.

There are 26 territories in Texas. Rates are statutory. In one territory, the Class III rate is 169.6% of the Class IA rate, 226% of the Class IAF rate. In another, the Class III rate is 171% of the Class IA rate, 231% of the Class IAF rate.

From the foregoing rate differentials, one recognizes that the letter carrier would have to pay a substantially higher rate if his insurance company were required to rate him Class III rather than Class IA or the more common Class IAF.

2. Rate Differential - Business Use by Court of Appeals Rationale and Non-Business Use

The rationale of the decision below is that there is the right of indemnity over by the United States against the insurance company even though the Attorney General (1) must defend the suit, (2) has complete control of the litigation, (3) has authority to settle claims administratively without judicial consent, (4) must litigate in the federal judiciary and (5) cannot have a jury trial — all in violation of the standard insurance contract provisions retaining all these rights and liabilities in the insurance company. This, of course, is what gives rise to Petitioner's well-taken argument that the decision below violates Petitioner's rights under the 5th and 7th Amendments.

As far as the letter carrier is concerned, constitutional academics are less important than money. One of Petitioner's experienced underwriting officers informally estimates that the average premium to a letter carrier would have to be increased 300% if the decision below were to be sustained and if, as contended *supra*, states were not to permit exclusionary endorsements. This comes about, NRLCA is told, because the practices of the United States and all private insurance companies are so vastly different in the handling of claims, both administratively and judicially. Among other things, insurance companies often settle many claims shortly after an accident — obviously in a sum much smaller than the same injured party might receive months or years thereafter. The federal agencies have neither facilities, internal authority nor disposition to handle claims in this manner.

Regardless of the reasons supporting an estimated 300% figure, the fact is that most letter carriers would become *uninsurable* because most letter carriers could not profitably operate their routes if they had to pay such dear premiums. Thus, the letter carriers seek herein to

preserve their livelihood for if they are uninsurable they are unemployable.[28]

VI. EQUAL PROTECTION OF THE LAWS

1. Inconsistency Among the States

A reading of the motor vehicle laws of the various states and an understanding of the rules of the various state motor vehicle regulatory bodies emphasizes the fact that while all states have laws which fly in the face of the Solicitor General's suggestion, the requirements of these laws vary.

The Government Drivers Law is supposed to apply equally to every citizen whose driving activity comes within its purview.

Giving the Solicitor General's suggestion the most generous attribute of plausibility, one can at most conclude that in a few states the letter carrier may find it possible to obtain insurance pursuant to a policy which has the restrictive endorsement. In those states, the letter carrier — the prohibitive premiums aside — might be able to do business. Even within these few states, there would be unequality. For example, Texas and Virginia permit an endorsement excluding the United States if it also excludes the named insured when the named insured is in the scope of his employment. If the courts were to sustain this exclusion,[29] the letter carrier having a separate business could not benefit by the exclusion unless he gave up his separate business.

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[28] This Court is asked to note that if a few letter carriers would not become uninsurable, they still would lose their employment because they are required to have a substitute vehicle available and, whether such substitute vehicle be their own, be rented or be borrowed, somebody would have to provide 300% premium coverage on the substitute vehicle also — a patent impossibility. See Part II, § 2, *supra*.

[29] NRLCA contends they would not. Part IV, § 2, *supra*.

In 37 states, National Insurance Underwriters, which underwriters for Petitioner herein with respect to POD rural letter carriers, is now attempting this type of endorsement. Aside from the poor legal life expectancy of this exclusionary endorsement, the unequal and adverse effect upon the insured is apparent.

South Carolina will not permit an exclusion of the named insured but allows exclusion of the United States when the named insured is in the scope of his employment — the opposite, so to speak, of the Texas and Virginia requirements. Other states require other variations or no variations.

As noted *supra*,[30] a purpose of the Government Drivers Law was to reduce premiums, not to increase them. Congress endorsed GSA's view that purchasing their own business coverage liability insurance "has imposed a heavy financial burden on the large number of such employees whose work entails their driving of motor vehicles on behalf of the Government . . .".[31]

2. Constitutional Litigation

NRLCA contends that these variations, even if insurance could be written, deprive the letter carrier of the equal protection of the applicable state statutes and the Federal Tort Claims Act as amended by the Government Drivers Law, in violation of § 1, 14th Amendment.

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[30] Part II, § 2.

[31] GSA letter, *op cit*, Fn 9, *supra*.

This Court can avoid the vexing volume of litigation which would ensue to test the various state statutes in the context of the Government Drivers Law as interpreted by the decision below simply by interpreting the Government Drivers Law consistent with Congress' intent.

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